89-159

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HERBERT H. JOHNSON, JR.,

Petitioner,

v.

PARK SHORE MARINA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Assuming that a danger of serious injury from diving off a recreational lake dock into shallow water would be obvious, does the fact that the danger is obvious necessarily preclude, as a matter of law, any duty to warn dock users of that danger under Michigan products-liability law?

2. Is the failure to warn of an unreasonable diving danger in itself a defect of the dock for purposes of Michigan products-liability law?

3. Is the duty to warn of a lake dock's danger to divers a question of fact for the jury or of law for the court, where a material question has been raised as to the reasonableness and foreseeability of the risk of severe injury posed by the dock to recreational divers?

LIST OF PARTIES

Plaintiff-Petitioner

Herbert H. Johnson, Jr.

Defendants-Respondents

Park Shore Marina
John L. Landow, d/b/a Park Shore Marina
Steven M. Palatinas, d/b/a Park Shore Marina
Lake Shore Products, Inc.

Parties *Not* Considered Respondents:

Third-Party Defendants

Arthur D. Anderson
Joanne Anderson
Gerald F. O'Connor
Catherine M. O'Connor

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OPINION BELOW

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's order granting summary judgment in favor of defendants-respondents.

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this appeal on an order granting writ of certiorari pursuant to 28 U.S. Code sec. 1254(1) (1982).

STATUTE INVOLVED

Revised Judicature Act
Mich. Comp. Laws Ann. sec. 600.2945

Products liability action; definition

Sec. 2945. As used in sections 2946 to 2949 and section 5805, "products liability action" means an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product.

STATEMENT OF THE CASE

The plaintiff-petitioner, Herbert H. Johnson Jr., appeals from a summary judgment in favor of manufacturers, sellers and installers of a recreational lake dock, from which Mr. Johnson dived into shallow water in June 1985. When he struck the lake bottom, Mr. Johnson sustained a spinal cord injury resulting in quadriplegia. Mr. Johnson asserted that defendants had a duty under Michigan law to provide warnings of the diving danger related to the dock's location in the lake, and that their failure to warn exposed him to unreasonable risk of injury and caused his injury.

The United States District Court of Appeals for the Sixth Circuit affirmed a summary judgment order of the United States District Court for the Western District of Michigan. (Appendix pp. 2, 21). The Sixth Circuit's opinion invoked the rule that *no* duty to warn of obvious dangers exists under Michigan product-liability law. (Appendix p. 17). Plaintiff-petitioner herein argues that the courts in Michigan, pursuant to *Owens v. Allis-Chalmers Corp.*, 414 Mich. 399 (1982), have emphatically and consistently rejected this patent-danger test in favor of one centered on the reasonableness of the risk. Plaintiff further argues herein that the learned court below has fundamentally frustrated Michigan's purposeful shift to product-liability tests that wherever possible preserve material issues of liability for the trier of fact.

On June 22, 1985, Herbert H. Johnson Jr., was a guest at an outdoor party at the summer home of Arthur Anderson, Joanne Anderson, Gerald Connor and Catherine Connor, all third-party defendants who are not respondents in this action. (Deposition of Herbert Johnson, taken March 5, 1988, at 40, 48). The home sits on the shore of Diamond

Lake in Cassopolis, Michigan. The Andersons intended that their guests use a dock extending 80 feet from their property out into the lake. (Deposition of Joanne Anderson, at 29).

During the course of the afternoon, another guest asked Mr. Johnson to join him for a swim, and Mr. Johnson agreed, walking to the end of the dock. (Johnson, March 5, 1988, at 56). With other guests gathered on the dock, Mr. Johnson sat down for a few minutes. (Johnson, March 5, 1988, 59-62). He then stood up at the end of the dock and, with knees bent and hands extended in front of him, dived into the lake. (Johnson, March 5, 1988, at 63-66).

The depth of the water at the end of the 80-foot dock that July was three to four feet. (Deposition of Arthur Anderson, at 33-36). Mr. Johnson was not told how shallow the water was at the end of the dock; he was not warned by anybody of the diving danger. (Johnson, March 5, 1988, at 179-80). It is uncontradicted that no printed signs existed on or near the dock warning of shallow water or diving danger. (Opinion of the District Court, Appendix p. 4). Mr. Johnson had noticed as he sat at the end of the dock that the water was green, but he did not try to see the lake bottom, and he did not in fact see the bottom. (Johnson, March 5, 1988, at 83-84). The spinal cord injury Mr. Johnson sustained when he struck the lake bottom has left him quadriplegic.

The wooden deck surface structure was first installed in the spring of 1985 by defendant Park Shore Marina. (Deposition of John Landow, at 25). The deck sections were made by Lake Shore Products according to Park Shore Marina's specifications. It has been the custom on area lakes to install such wooden dock sections on lake-bottom metal anchors each spring, and to remove them before the onset of winter. Employees of Park Shore

Marina installed the Andersons' new dock by sliding metal cross members into sleeves mounted on the bottom, then fitting the wooden sections atop the metal substructure. (Landow, at 17-18). Park Shore Marina had annually installed an older wooden deck structure for the property's previous owners since 1980. (Landow, at 67). It was Park Shore Marina that advised the third-party defendants in 1984 the old dock was worn out. (Landow, at 8-9).

John Landow, an owner of Park Shore Marina, had known how shallow the water was at the end of the 80-foot dock for at least five years preceding Mr. Johnson's catastrophic dive. (Landow, at 68). Local people knew Diamond Lake generally to be a shallow lake. (Landow, at 27). Further, Landow knew people often dived off the docks on Diamond Lake. Of all the dives he had seen off docks on the lake, Landow estimated that half were into water only three or four feet deep. (Landow, at 69). Importantly, before Mr. Johnson's injury, Landow knew that people who dived into three or four feet of water could sustain severe spinal cord injury. (Landow, at 70, 72-73).

Defendant Lake Shore Products is a dock-manufacturing business. When it made the wooden surface for the Andersons' dock at the request of Park Shore Marina, Lake Shore Products was not aware that the dock was on Diamond Lake. (Deposition of James Starr, at 17-18). Yet James Starr, an owner of Lake Shore Products, knew that his docks frequently were placed in shallow water, that people often used docks as diving platforms, and that a person diving off a dock into shallow water could sustain serious, permanent injury. (Starr, at 36). This knowledge notwithstanding, Lake Shore Products did not print a warning as to diving dangers on this dock or any of its docks. Nor did it furnish warning signs to be posted near docks made from its wooden dock sections. (Starr, at 31).

Mr. Johnson brought suit under two theories, breach of the implied warranty of fitness and merchantability, and negligence in the manufacturing, selling and installing of the dock by defendants-respondents Lake Shore Products, Inc., Park Shore Marina, John Landow and Steven Palatinas, d/b/a Park Shore Marina.

The Sixth Circuit, in affirming summary judgment for the defendants, represented as undisputed fact that 1) the dock itself contained no defect, and 2) the risk of Mr. Johnson's injury was open and obvious. On the contrary, these issues go to the core of the complaint and are very much in dispute, as the record bears out. Though required on a summary judgment motion to construe the evidence in a light most favorable to the non-movant, here the court below did the opposite. The learned court erred by failing even to acknowledge plaintiff's proof that the dock was defective and that the risk of quadriplegia to a novice diving off a dock extending nearly 80 feet into a lake was not obvious.

SUMMARY OF THE ARGUMENT

The learned court below plainly erred in holding that, under Michigan products liability law, there is necessarily no duty to warn or protect against dangers which are obvious. *Johnson v. Park Shore Marina et al.*, No. 88-1769, slip op. at 1 (6th Cir. Apr. 25, 1989) (per curiam). To the contrary, the Supreme Court of Michigan has explicitly ruled that the test of liability "is not whether the risks are obvious, but whether the risks were unreasonable in light of the foreseeable injuries." *Owens v. Allis-Chalmers Corp.*, 414 Mich. 399 at 425, 327 N.W.2d 222 (1982). Since *Owens*, patency of the danger can at best be viewed as

one among many factors that may or may not make a product-related danger unreasonable.

In rejecting the patent-danger rule, the Michigan courts joined the trend among state judiciaries recognizing the fundamental unfairness of a rule subordinating the question of whether the danger of injury is reasonable to the question of whether the danger could be readily perceived. As the Michigan Supreme Court observed in *Owens*, "Obvious risks may be unreasonable risks, and there is no justification for departing from general negligence principles merely because the dangers are patent." *Id.* at 425. The patent-danger rule mistakenly relied upon below worked to handicap both specific plaintiffs and consumers generally by immunizing makers of blatantly defective products from liability. *Products Liability—Patent Danger*, 35 ALR 4th 861.

The facts of the second of the two cases relied upon by the Sixth Circuit, *Ross v. Jaybird Automation, Inc.*, 172 Mich. App. 603, 432 N.W.2d 734 (1988), are not analogous to the issues here. The rule of *Ross*—that where a product-related danger is obvious and the product itself is not defective, there is no liability—is strictly limited to cases where expert users use products aimed at professionals. So said the Michigan Supreme Court in *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 327 N.W.2d 814 (1982), when it promulgated the rule invoked in *Ross*. Both *Antcliff* and *Ross* involved expert users, unlike the case of a recreational swimmer here on appeal.

The mere fact that a product was well made does not mean it is not defective. Michigan courts have long recognized that an inadequate warning is in itself a product defect. *Smith v. E.R. Squibb & Sons*, 405 Mich. 79, 89, 273 N.W.2d 476 (1979).

The reasonableness rule of *Owens* pervades products-liability law in Michigan today. Where the facts determining reasonableness are at issue, the question of liability is one of fact for the jury. *Horen v. Coleco Industries, Inc.*, 169 Mich. App. 725, 729, 426 N.W.2d 794 (1988); *Gootee v. Colt Industries, Inc.*, 712 F.2d 1057 (6th Cir. 1983).

The Sixth Circuit's affirmation of summary judgment in favor of the defendants ignores the substantial fact questions raised by plaintiff-petitioner as to the obviousness of the danger and the defectiveness of the product. Although the court below adopts the contrary view that the danger was in fact obvious and the product itself was not in fact defective, on a summary judgment the court is required to view the facts in the light most favorable to the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Further, under Michigan law, a genuine issue as to whether a user was fully aware of a product danger is a fact question precluding summary judgment for manufacturers. *Michigan Mutual Insurance Co. v. Heatilator Fireplace*, 422 Mich. 148, 366 N.W.2d 202 (1985).

In denying Mr. Johnson a jury trial, the Sixth Circuit failed even to heed its own advice as to the importance of leaving product liability questions for Michigan juries. "The right to put one's case before the jury has been carefully guarded in products liability cases" in Michigan. *Gootee, supra*, 712 F.2d at 1063 citing to *Green v. Volkswagen of America, Inc.*, 485 F.2d 430 (6th Cir. 1973).

A recent Michigan appellate case made clear that the duty to warn in a diving case is a fact question for the jury. *Horen, id.*, 169 Mich. App. at 729, 426 N.W.2d 794 (1988). In *Horen*, the court held that the risk of a serious injury was sufficient to preclude summary judgment favor-

ing defendant, even where the shallow depth of an above-ground pool was plain to see for the plaintiff. In an even more recent diving case, the appellate court cited mounting evidence of catastrophic diving injuries in holding that divers may not fully sense the risk of shallow dives without proper warning. *Glittenburg v. Wilcenski*, 174 Mich. App. 321, 326 (1989). "We do not believe the risk of serious injury, in this case paraplegia, is obvious in the absence of some kind of warning. A simple act of pleasure on a hot summer's day, a dive into a pool, can result in a lifetime of heartache, frustration, pain and loss. Nothing in the appearance of the pool itself gives a warning of the very serious consequences to which a mundane dive can lead." *Id.* at 326.

If anything the risk of diving into a backyard pool should be more obvious to an unsuspecting user than the risk of diving off a dock extending 80 feet over a lake. That the dock's end sat in shallow water, and that diving into shallow water invited serious injury, were foreseeable to the defendants in this case, as the transcript record bears out.

In summary, the Sixth Circuit erred by adhering to a patent-danger rule rejected by the Michigan courts; by viewing the facts in a light favoring the movant rather than non-movant; and by failing to abide by Michigan's preference in products liability law for jury determination of the reasonableness of a failure to warn of product-related hazards.

ARGUMENT

I.

THE COURT BELOW PLAINLY MISAPPLIED THE WELL-SETTLED RULE OF MICHIGAN PRODUCT-LIABILITY LAW THAT THE DUTY TO WARN OF PRODUCT-RELATED DANGERS TURNS ON HOW FORESEEABLE AND UNREASONABLE THE RISK IS, *NOT* ON HOW OBVIOUS THE DANGER IS.

The learned court below misconstrued both the facts of this case and the law of Michigan in summarily holding that Mr. Johnson was barred from recovering for defendants' failure to warn of a dock-related diving danger where that diving danger was, in the court's view, obvious. First, the record amply raises a fact question as to how obvious it should have been to Mr. Johnson, if at all, that to dive from the dock was to risk quadriplegia. Mr. Johnson said he saw the water's color but not the lake bottom before he dived. (Johnson, March 5, 1988, at 83-84.) As a person unfamiliar with Diamond Lake, he quite reasonably could have thought the water's depth off the end of a 80-foot-long dock well exceeded three or four feet. Further, it is settled law in Michigan that even consciousness of a vague danger, without full appreciation of the seriousness of the consequences, will not bar recovery for failure to warn in a product case. *Graham v. Ryerson*, 96 Mich. App. 480, 489, 292 N.W.2d 704 (1980). In Michigan courts, a genuine issue of material fact as to a product user's awareness of a product danger *precludes* summary judgment for manufacturers on a complaint alleging negligent failure to warn. *Michigan Mutual Insurance Co. v. Heatilator Fireplace*, 422 Mich. 148, 366 N.W.2d 202 (1985). Likewise, in federal practice under F.R.Civ.P. 56(c), the extent of Mr. Johnson's awareness of danger raises

a sufficient fact question to bar summary judgment for the defendants, when the facts are viewed most favorably for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The more fundamental and irreconcilable error of law in the Sixth Circuit's opinion, however, is its patently inaccurate claim that "there is no duty to warn or to protect against dangers which are obvious." *Johnson v. Park Shore Marina et al.*, No. 88-1769, slip op. at 1 (6th Cir. Apr. 25, 1989) (per curiam). This quite plainly misstates Michigan products liability law, as that state's courts have made clear in a slew of opinions pursuant to *Owens v. Allis-Chalmers Corp.*, 414 Mich. 399, 327 N.W.2d 222 (1982). Adopting the view already held at the time by that state's appellate courts, the Michigan Supreme Court in *Owens* held that while obviousness of the danger may be one of several *factors* to be weighed under the test for liability, the test itself is whether the risks are unreasonable in light of foreseeable injuries. *Id.* at 425. Thus, even an obvious product-related danger would not bar recovery if the risk of injury from the danger was both foreseeable and unreasonable.

That oft-stated reasonableness rule appeared again in *Horen v. Coleco Industries, Inc.*, 169 Mich. App. 725 at 729 (1988), a swimming pool injury case procedurally and factually analogous to the issues here on appeal. The court in *Horen* further held that a duty to warn question becomes a standard of care question for the *jury*, not a question of law for the court, where the issue is whether the product-related risk was unreasonable. *Id.* at 729. The pro-jury question, anti-patent danger message of *Horen* was reinforced in a similar swimming-pool injury case, *Glittenburg v. Wilcenski*, 174 Mich. App. 321, 435 N.W.2d 480 (1989). There the court, citing mounting accident data on catastrophic dives, concluded that unwarned divers con-

front injury risks far exceeding what their senses may tell them—even where they can readily judge the depth of an above-ground swimming pool. *Id.* at 326. Stressing plaintiffs' equities in cases where routine activities turn to disaster, the appellate court held that the pool builder had a duty to warn of the risk of paralysis from shallow dives:

> "We do not believe the risk is open and obvious. We believe the risk of serious injury, in this case paraplegia, is not obvious in the absence of some kind of warning. *A simple act of pleasure on a hot summer's day, a dive into a pool, can result in a lifetime of heartache, frustration, pain and loss. Nothing in the appearance of a pool itself gives a warning of the very serious consequences to which a mundane dive can lead.*" (emphasis added) *Id.* at 326.

Significantly, the result below failed to heed even the Sixth Circuit's own advice as to the importance of leaving products liability questions for Michigan juries. In a products case in which plaintiff appealed a directed verdict for defendant, the Sixth Circuit cautioned that, in Michigan:

> "The right to put one's case before the jury has been carefully guarded in products liability cases." *Gootee v. Colt Industries Inc.*, 712 F.2d 1057 at 1063 (6th Cir. 1983), citing to *Green v. Volkswagen of America, Inc.*, 485 F.2d 430 (6th Cir. 1973).

Similarly, in a case alleging defective prescription drug design, the Sixth Circuit noted "the strong inclination in Michigan law toward favoring trial of any properly pled claims unless those claims are 'clearly unenforceable as a matter of law.' " *Bogorad v. Eli Lilly & Co.*, 768 F.2d 93, 95 (6th Cir. 1985), quoting *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (1984).

The reasonableness rule of *Owens* and the jury-question admonition of *Horen* pervade contemporary Michigan product cases. In contrast, the discredited patent-danger rule and the variation on that rule relied upon by the court below are, respectively, bad law, and law explicitly limited to facts not analogous to the facts at issue here.

A. The Learned Court's Holding That An Obvious Danger Necessarily Bars A Duty To Warn Of Product-Related Dangers Revives The Patent-Danger Rule Of *Fisher* Long Since Abandoned By Michigan Courts Pursuant To *Owens*.

The obvious-danger rule invoked by the Sixth Circuit derives directly from the pre-1982 standard set forth in *Fisher v. Johnson Milk, Inc.*, 383 Mich. 158, 174 N.W.2d (1970). The Sixth Circuit, in the only statement of law supported by citations in the case below, held:

> "Under Michigan law, 'there is no duty to warn or to protect against dangers which are obvious.' *Pettis v. Nalco Chemical Co.* 388 N.W.2d 343, 346 (Mich. App. 1986). *See also Ross v. Jaybird Automation, Inc.*, 172 Mich. App. 603, 432 N.W.2d 374 (1988) ('there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous')."

Johnson v. Park Shore Marina et al., No. 88-1769, slip op. at 1, 2 (6th Cir. Apr. 25, 1989) (per curiam).

The *Pettis* opinion cited by the court below, in turn, ascribed the rule quoted above solely to *Fisher*, 383 Mich. at 160, *Pettis v. Nalco Chemical Co.*, 150 Mich. App. 294, 302, 388 N.W.2d 343 (1986). The rule as phrased in *Fisher* is virtually identical: "There is no duty to warn or protect against dangers obvious to all." Thus, indisputably *Fisher* is the root of law supporting the Sixth Circuit's

opinion as to obvious dangers. As noted above, however, prior to *Pettis* the Michigan Supreme Court in *Owens* had scrapped the patent danger rule of *Fisher*. Said the court: "Obvious risks may be unreasonable risks, and *there is no justification for departing from general negligence and breach of implied warranty principles merely because the dangers are patent.*" (emphasis added). *Owens*, 414 Mich. at 425.

While it did not overturn *Fisher* in so many words, *Owens* strictly limited it to "simple tool" cases, and said that even there, obviousness of the danger is nothing more than a factor among many which may contribute to the conclusion that such products are unreasonably dangerous. "The test, however, is not whether the risks are obvious, but whether the risks were unreasonable in light of the foreseeable injuries." *Id.* at 425. *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 688, 365 N.W.2d 176 (1984). *Moning v. Alfono*, 400 Mich. 425, 450, 254 N.W.2d 759 (1977). *Pettis*, 150 Mich. App. at 301-302. *Horen*, 169 Mich. App. at 729.

The district court, in its opinion below granting summary judgment in favor of defendants, reasoned that the patent-danger rule survived *Owens* and remains in force for failure-to-warn cases because *Owens* applied only to design defects, not failure-to-warn cases. (Appendix p. 17). This rationale errs in two respects: 1) Inadequate warnings *are* product defects, as the Michigan Supreme Court resolved in *Smith v. E.R. Squibb and Sons*, 405 Mich. 79, 89, 273 N.W.2d 476 (1979). 2) The reasonableness test of products liability in *Owens*, which supplanted the patent-danger test, was and is the standard in all Michigan product cases, whether the alleged defect is patent or latent. *Horen*, 169 Mich. App. at 729. *Glittenburg*, 174 Mich. App. at 325, *Downie v. Kent Products*, 122 Mich. App.

722, 731, 333 N.W.2d 528 (1983) (jury question as to duty to warn of faulty clutch mechanism in a punch press).

In *Horen*, the court reversed summary judgment for a defendant pool manufacturer which argued it had no duty to warn of the risks of diving off the deck of a swimming pool four to five feet deep because the risk of such a dive was open and obvious. *Horen*, 169 Mich. App. at 729. Noting that the open danger test of *Fisher* no longer stated Michigan law post-*Owens*, the court reasoned that a recreational swimmer might believe a shallow dive could be executed without threat of death or paraplegia. *Id.* at 731. Likewise, a recreational swimmer such as Mr. Johnson had reason to believe he could execute a dive off a lake pier without threat of paralysis. And while he may not have attempted a "shallow" dive as did the plaintiff in *Horen*, that plaintiff had reason to know how shallow the above ground pool was, whereas Mr. Johnson could reasonably have thought the lake was deeper.

In *Owens*, the state Supreme Court affirmed a directed verdict for a forklift manufacturer because of plaintiff's failure to make out the prima facie case that the forklift's lack of a safety belt posed an unreasonable risk in view of available alternatives. *Owens*, 414 Mich. at 429. Thus, the issue was not whether the defect was obvious, but whether a defect existed, obvious or not. In contrast, Mr. Johnson clearly has made out the case that a failure to warn of the dock-related diving danger foreseeably exposed him to an unreasonable risk of injury.

Even *Fisher*, source of the patent-danger rule, is readily distinguishable on the facts from the case here at issue. There the court held that the maker of a metal-wire milk bottle case had no duty to warn of the risk of breakage should the bottles drop. *Fisher*, 383 Mich. App. at 164. That danger was obvious to all, the court said.

> "This is not the case of a piece of machinery, looking alright on the surface but containing a defect not observed or observable by plaintiff, which operated in such a fashion, unexpectedly, as to be dangerous and to injure plaintiff." *Id.* at 162.

In contrast, it is contended that the dock which enabled Mr. Johnson's dive was in fact a product with a hidden product-related defect: a shallow lake bottom which one would not expect to find at the end of a long recreational dock.

B. In Citing To The Rule Of *Ross* That No Duty Exists Where The Danger Is Obvious And The Product Itself Is Not Defective, The Sixth Circuit Ultimately Relied Upon A Rule Explicitly Limited To Expert Product Users Distinguishable From Mr. Johnson.

The learned appellate court's reference to the patent-danger rule parenthetically included the rule of *Ross v. Jaybird Automation, Inc.*, 172 Mich. App. 603, 432 N.W.2d 374 (1988): "(T)here is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or obvious." *Johnson*, No. 88-1769, slip op. at 2. *Ross*, in turn, took the rule from *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 327 N.W. 2d 814 (1982). In *Antcliff*, which followed *Owens* by less than one month, the Michigan Supreme Court said, "We hold only that on the facts of *this* case *this* defendant was under no duty to instruct on or give directions for the safe rigging of its product." (emphasis in original) *Id.* at 627. There the court held that the manufacturer of a powered scaffold had no duty to instruct a crew of painters expert in scaffold use as to safe rigging of a scaffold. *Id.* at 635. Similarly, the state appellate court in *Ross* held that the maker of a machine used in metal stamping had no duty to warn expert machinists of the hazards of a faulty electrical hookup. *Ross*, 172 Mich. App. at 376. The

legal thread connecting these cases is that each involved expert product users facing dangers obvious to expert eyes.

Importantly, the Sixth Circuit itself acknowledged this limit on the rule of *Antcliff* in a Michigan duty-to-warn case about protective goggles which shattered, injuring a factory worker. *Rusin v. Glendale Optical Co., Inc.*, 805 F.2d 650 (6th Cir. 1986). The learned court there observed that in both cases, the manufacturer sold its product to professional users, and the users were experienced and expert. "In view of *Antcliff*," the Sixth Circuit ruled, "we decline to hold that a manufacturer of protective spectacles who sells its product to a sophisticated, professional user like Chrysler has a duty to warn one of Chrysler's highly skilled employees such as the appellee of the availability of alternative products." *Id.* at 654. Here in *Johnson*, however, the Sixth Circuit makes no mention of that recent, contrary treatment of *Antcliff*. *Johnson*, No. 88-1769, slip op. at 2. That inconsistency obscures but cannot change *Antcliff's* restriction to expert users. In that respect, it is readily distinguishable on the facts from this case of an unskilled recreational diver's foreseeable use of a dock for diving.

C. The Rejection Of The Patent-Danger Rule By Courts In Michigan And Throughout The Nation Was A Reasoned Remedy Of A Fundamentally Unfair Rule That Made Assumption Of The Risk A Question For Judges Rather Than Juries, And That Created Incentives For Blatantly Dangerous, As Opposed To Less Perceptible, Product Defects.

By renouncing the patent-danger rule in *Owens*, the Michigan Supreme Court intended more than a technical adjustment in products liability theory. *Owens* was part of a widespread response by the states to mounting criticism of the patent-danger rule as an impediment to jury

trials on the merits and as a legal anachronism incongruous with modern reasonableness tests of liability. The trend gained impetus in 1976 when the New York Court of Appeals overturned *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950) in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571 (1976). The Michigan Supreme Court had used *Campo* as authority in adopting the patent-danger rule in *Fisher*.

> "Critics reasoned that the patent-danger rule put an unfair burden on product plaintiffs. Where there were 'open and obvious' risks, the worker or other person using the product was deemed to be on a par with the manufacturer. This amounted to applying an assumption of the risk defense as a matter of law, with the added disadvantage that the defendant was relieved of the burden of proving that plaintiff had subjectively appreciated a known risk."

—Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 Hofstra L. Rev. 521, 541 (1974).

> Where the patent danger rule has been rejected or abandoned, the courts have generally reasoned that the latent-patent distinction, which is implicit in the rule, encourages obvious misdesign of products and should not be available to immunize manufacturers of obviously defective or dangerous products from liability.

—*Products Liability—Patent Danger*, 35 ALR4th 861.

In view of this purposeful shift away from the patent danger rule, for the Sixth Circuit to now fall back on the abandoned rule of *Fisher* is to frustrate the reform choice of the courts of the sovereign State of Michigan.

II.

THE SIXTH CIRCUIT'S CONCLUSION THAT THE DIVING DANGER WAS OBVIOUS AND THE DOCK WAS NOT DEFECTIVE CONTRAVENED PROCEDURAL RULES FOR SUMMARY JUDGMENT BY VIEWING FACTS MOST FAVORABLY FOR THE MOVANT, NOT THE NON-MOVANT.

On the issues of fact, the court below erred in surmising that 1) there is no dispute that the dock itself is not defective or dangerous; and 2) the danger of diving into the lake waters off the dock were open and obvious, and Mr. Johnson conceded that fact. *Johnson*, No. 88-1769, slip op. at 2. As to the first, plaintiff has properly pled a dock-related defect in the form of a failure to warn of the foreseeable danger of a risk of serious injury.

As noted above, Michigan courts have long recognized that an inadequate warning is in itself a product defect. *Smith*, 405 Mich. at 89. A manufacturer may have a duty to warn even though a product is perfectly made. *Pettis*, 150 Mich. App. at 301. In its arguments to the courts below, defendants-respondents cited no Michigan cases saying that a product defect must be something other than a failure to warn.

In *Pettis*, the state appellate court held that the maker of a chemical that aids in the molding of molten steel had a duty to warn of an explosion danger when the chemical was overused. *Id.* at 301. The chemical in *Pettis* was defective not in the way it was made, but in the unreasonably risky way it foreseeably combined with its environment. Similarly, the dock's defect is its relation to a shallow lake and the attendant danger to divers.

A long dock over an unusually shallow lake is factually akin to well-made metal ball bearings whose brittleness is hidden from workers who foreseeably strike the bear-

ings with a hammer. *Thomas v. International Harvester Co.*, 57 Mich. App. 75, 82 (1974).

Likewise, bags of charcoal briquettes perfectly made could nonetheless be defective due to failure to adequately warn of a fume hazard arising when charcoals are burned in unventilated areas. *Hill v. Husky Briquetting Co.*, 54 Mich. App. 13, 220 N.W.2d 137 (1974).

The learned court's conclusion that the diving danger was obvious is nowhere supported in the record. Although Mr. Johnson said he had general knowledge that diving into shallow water could break a person's neck, (Deposition of Herbert Johnson, taken March 5, 1988 at 175-178), here he said he did not see and did not know how shallow the lake was at the end of the 80-foot dock. As noted above, vague awareness of a danger alone will not bar recovery. *Graham*, 96 Mich. App. at 489.

While generally the duty question is one of law for the court, *Moning*, 400 Mich. at 436, where the reasonableness and foreseeability of the risk are disputed, the question of liability is for the jury. *Downie*, 122 Mich. App. at 731. *Gootee*, 712 F.2d 1057 at 1064. *Horen*, 169 Mich. App. at 730. *Casey v. Gifford Wood Co.*, 61 Mich. App. 208, 214, 232 N.W.2d 360 (1975).

In *Horen*, the swimming pool case described above, the court reasoned:

> "In this case, however, defendants' argument that they had no duty to warn of the diving danger really relates to the applicable specific standard of care—a question for the jury—instead of the existence of a legal duty." *Horen*, 169 Mich. App. at 730.

The court continued:

> "Where, as here, injury was reasonably foreseeable, the manufacturer's use of reasonable care in guard-

ing against unreasonable or foreseeable risks is a jury question, even where the danger is obvious." *Id.* at 730.

The duty to warn extends to risks associated with foreseeable *misuses* of the product. *Antcliff*, 414 Mich. at 638. In this case, ample evidence exists that defendants could foresee shallow-water-diving from the dock, even if they considered such activity inappropriate. Mr. Landow of the installing company said he knew the water at the end of the dock was three to four feet deep; he knew people often dived off docks at Diamond Lake; and he knew people who dived in shallow water risked serious injury. *Landow*, at 68, 69, 70, 72, 73. Mr. Starr of the dock manufacturer said he, too, generally knew that people diving off docks in shallow water risked major injury. *Starr*, at 36. Viewed in a light favoring the non-movant, these admissions should bar a finding that foreseeability was absent. As to reasonableness, the indisputable fact of Mr. Johnson's injury sufficiently illustrates the magnitude of the risk to preclude summary judgment.

The Michigan Supreme Court ruled out summary judgment in favor of defendants in a duty-to-warn case wherein the evidence raised a genuine issue of material fact as to whether a homeowner was fully aware of the fire risk posed by the blockage of vents on a fireplace made by defendants. *Michigan Mutual*, 422 Mich. 148, 366 N.W.2d 202 (1985). Similarly, here a genuine issue of material fact is raised as to whether Mr. Johnson was fully aware of the risk of quadriplegia posed by the positioning of the dock in shallow water.

CONCLUSION

To summarize, the patent-danger rule invoked by the Sixth Circuit is a discredited standard in Michigan products liability law which here serves only to frustrate that state's determination to preserve factual disputes in products cases for the jury. The Sixth Circuit's conclusion that no such disputes here exist both defies its own guidance in similar recent cases and clearly fails to view the facts most favorably for the non-movant, as the federal rules of procedure require. Plaintiff-petitioner Herbert H. Johnson Jr. respectfully petitions this Court to reverse the judgment below.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

[NOT RECOMMENDED FOR FULL TEXT PUBLICATION]

No. 88-1769

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HERBERT H. JOHNSON, JR.,

Plaintiff-Appellant,

v.

PARK SHORE MARINA; JOHN L. LANDOW, doing business as Park Shore Marina; STEVEN M. PALATINAS, doing business as Park Shore Marina; LAKE SHORE PRODUCTS, INC.,

Defendants, Third Party Plaintiffs-Appellees,

ARTHUR D. ANDERSON; JOANNE ANDERSON; GERALD F. CONNOR; CATHERINE M. CONNOR,

Third Party Defendants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Decided and Filed April 25, 1989

BEFORE: MARTIN, KRUPANSKY, and MILBURN; Circuit Judges.

PER CURIAM. Plaintiff-appellant Herbert H. Johnson (Johnson), has appealed from the decision of the district court granting summary judgment in favor of the defendants-appellees Park Shore Marina, John L. Landow, Steven M. Palatinas, and Lakeshore Products, Inc. denying Johnson's claim that defendants had a duty to warn

divers about the dangers posed by diving off a dock into shallow water. Under Michigan law, "there is no duty to warn or to protect against dangers which are obvious." *Pettis v. Nalco Chemical Co.*, 388 N.W.2d 343, 346 (Mich. App. 1986). *See also Ross v. Jaybird Automation, Inc.*, 432 N.W.2d 374 (Mich. App. 1988) ("there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous"). In the case at bar, there is no dispute that the dock itself was not defective or dangerous. Because the dangers of diving into unknown waters are open and obvious, as Johnson himself conceded in his deposition testimony, there was no duty to warn about the danger. Upon review of the claimant's assignments of error, the record in its entirety, the briefs of the parties and the arguments of counsel, this court concludes that the entry of summary judgment was without error.

Accordingly, the summary judgment in favor of defendants-appellees is AFFIRMED for the reasons stated in the district court's June 10, 1988 opinion granting summary judgment.

[Filed June 10, 1985]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. K86-452 CA8

HERBERT H. JOHNSON, JR.,

Plaintiff,

v.

PARK SHORE MARINA, a partnership;
JOHN L. LANDOW, doing business
as Park Shore Marina;
STEVEN M. PALATINAS, doing business
as Park Shore Marina, and
LAKE SHORE PRODUCTS, INC.,

Defendants and Third-Party Plaintiffs,

v.

ARTHUR D. ANDERSON; JOANNE ANDERSON;
GERALD F. CONNOR; and CATHERINE M. CONNOR,

Third-Party Defendants,

and

LAKE SHORE PRODUCTS, INC.,

Cross Plaintiff,

v.

PARK SHORE MARINA; JOHN L. LANDOW; and
STEVEN M. PALATINAS,

Cross Defendants.

OPINION

This matter is before the Court on defendants' motions for summary judgment. The Court finds that no material facts remain in dispute and that defendants are entitled to judgment as a matter of law. Therefore, defendants' motions will be granted.

Facts

The relevant facts are not in dispute. On June 22, 1985 the plaintiff, Herbert Johnson, attended a party at the summer home of a co-worker, Joanne Anderson. Third-party defendants, Arthur and Joanne Anderson and Gerald and Catherine Connor owned the home. The home is located on Diamond Lake in Cassopolis, Michigan, and features a wooden dock which, at the time, extended some eighty feet (80') into the lake. The water in Diamond Lake surrounding the dock was approximately four feet (4') deep. At some point on the afternoon of June 22, Mr. Johnson dove, head first, from the dock into the lake. Because the water was so shallow, he struck the bottom of the lake, breaking his neck and rendering himself a quadriplegic. Mr. Johnson contends that he was unaware of the water's depth at the time, and that he assumed it was safe to dive into the lake because the water was green in color, a large boat was moored at a nearby dock, and because motor boats were running further into the lake. He further contends that the homeowners (third-party defendants Anderson and Conner) did not inform him of the water's depth. It is undisputed that there were no warning signs near the dock, nor were there any labels or other warnings placed on the dock itself.

Mr. Johnson brings this action, pursuant to the Court's diversity jurisdiction, against Park Shore Marina, its pro-

prietors John Landow and Steven Palatinas ("Park Shore"), and Lake Shore Products, Inc. ("Lake Shore"). He also maintains a suit against the property owners in Illinois state court. Park Shore installed the dock at issue. The dock consists of steel support pipes permanently embedded in the lake bed and wooden deck sections which are installed each spring and removed each winter. Park Shore installed the wooden deck sections for five consecutive years, and in 1985, the year of Mr. Johnson's accident. In the spring of 1985, Park Shore replaced certain pieces of the wooden decking which had rotted over the winter. Lake Shore Products, Inc. manufactured these wooden deck sections to Park Shore's and the owners' specifications.

Mr. Johnson premises this action on the theory that defendants Park Shore and Lake Shore were negligent in manufacturing and installing the dock without providing adequate warnings of the shallow water and of the danger associated with diving from the dock, and in failing to provide adequate instructions for the use of the dock. His complaint also alleges a breach of the implied warranty of merchantability, resting on the same duty to warn arguments. Defendants Park Shore and Lake Shore seek summary judgment, arguing that they had no duty to warn of the obvious danger of diving from the dock into shallow water. They also contend that Mr. Johnson was aware of the danger associated with diving into shallow water, although they do not contend that Johnson was aware of the depth of Diamond Lake when he dove into the water on July 22, 1985. Further, defendant Lake Shore argues that it merely supplied replacement deck sections to Park Shore and was never informed of the use to which the sections would be put or of the depth of the water in Diamond Lake.

Since the Court sits in diversity, the Court will apply the substantive law of the state of Michigan, the site of the tort, to this matter. Procedural matters, such as the appropriate standard for summary judgment, are governed by federal law. F.R.Civ.P. 56(c). In considering a motion brought pursuant to Rule 56, the narrow questions presented to this Court are whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." *Id.* The Court cannot try issues of fact on a Rule 56 motion, but is empowered only to determine whether there are issues to be tried. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L.Ed.2d 538 (1986); *In re Atlas Concrete Pipe Inc.*, 668 F.2d 905, 908 (6th Cir. 1982).

The moving party has a right to summary judgment where that party is able to demonstrate, prior to trial, that the claims of the non-moving party have no factual or legal basis. *Celotex Corporation v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265 (1986). As the Supreme Court held in *Celotex*, ". . . the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of any element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 91 L.Ed.2d at 273.

The standard for granting a motion for summary judgment is essentially the same as that for granting a motion for directed verdict. "The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . ." *Anderson*, 91 L.Ed.2d at 214

(1986). The moving party is not entitled to summary judgment where there is sufficient evidence to allow a reasonable jury to return a verdict for the non-movant. *Id.* at 211-12. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 214. *See also, Matsushita*, 89 L. Ed.2d at 587 ("where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial' "). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.*

Discussion

Under Michigan law, in order to recover on a failure to warn theory, the plaintiff must prove each of the four elements of negligence: (1) that defendant owed a duty to plaintiff; (2) that defendant violated that duty; (3) that defendant's breach of duty was the cause in fact and a proximate cause of damages suffered by plaintiff; and (4) that plaintiff suffered damages. *Moning v. Alfono*, 400 Mich. 425, 437 (1977); *Pettis v. Nalco Chemical Co.*, 150 Mich. App. 294, 299 (1986); *Warner v. General Motors Corp.*, 137 Mich. App. 340, 348 (1984). Where the plaintiff pleads breach of the implied warranty of merchantability based upon a failure to warn or a design defect, the plaintiff must prove exactly the same elements. *Anticliff v. State Employees Credit Union.* 414 Mich. 624, 637-38 (1982); *Smith v. E R Squibb & Sons, Inc.*, 405 Mich. 79, 273 N.W.2d 476, 479-80 (1978); *Guaranteed Construction Co. v. Gold Bond Products*, 153 Mich. App. 385, 392-93 (1986); *Spencer v. Ford Motor Co.*, 141 Mich. App. 356, 361 (1985). Under either theory, the plaintiff must establish that the product itself was "not reasonably fit for its

intended, anticipated or reasonably foreseeable use." *Guaranteed Construction*, 153 Mich. App. at 392; *Goldman v. Phantom Freight*, 168 Mich. App. 472, 481 (1987); *Trotter v. Hamill Manufacturing Co.*, 143 Mich. App. 593, 599 (1985) ("the defendants may be subject to liability for failure to warn about a risk that is related to intended uses and reasonably foreseeable uses"). The duty to warn extends to foreseeable risks associated with reasonably foreseeable misuses of a product. *Antcliff*, 414 Mich. at 638; *Pettis*, 150 Mich. App. at 301; *Trotter*, at 602. Inadequate warnings alone can constitute a product defect. *Smith*, 273 N.W.2d at 479. As the Michigan Supreme Court held in *Smith*:

> [W]hen the factual issue is not whether the product itself is defective, but is whether the manufacturer has provided adequate warnings, the existence of a product defect and a breach of duty is determined by the same standard—reasonable care under the circumstances. . . . The test for determining whether a legal duty has been breached is wheher defendant exercised reasonable care under the circumstances.

Smith v. E R Squibb & Sons, Inc., 405 Mich. 79, 273 N.W. 2d 476, 480 (1978).

The duty to warn arises where the manufacturer is aware of risks associated with the intended and reasonably foreseeable uses of a product:

> A manufacturer's duty is not just to use reasonable care in the design and manufacture of a product. A manufacturer may have a duty to warn even though a product is perfectly made. A manufacturer is liable in negligence for a failure to warn the purchasers or users of its product about dangers associated with intended uses and also foreseeable misuses. A manufacturer's standard of care includes the dissemination of information, whether styled as warnings or instruc-

> tions, as is appropriate for the safe use of its product. . . . However, there is no duty to warn or protect against dangers which are obvious to all.

Pettis v. Nalco Chemical Co., 150 Mich. App. 294, 301-02 (1986). *See also, Antcliff v. State Employees Credit Union*, 414 Mich. 624, 639 (1982) (policy requiring adequate warnings not applied "in situations involving known or obvious product-connected dangers where the product itself is not defective or dangerous.").[1]

In addition to demonstrating the existence of a duty to warn (e.g., that there are reasonably foreseeable risks associated with the intended and foreseeable uses of a product), the plaintiff must demonstrate that the product proximately caused his or her injuries. "Products liability actions grounded in negligence or breach of implied warranty require a causal connection between the manufacturer's negligence or product defect and the plaintiff's injury. . . ." *Spencer v. Ford Motor Co.*, 141 Mich. App. 356 (1985). As the Michigan Supreme Court recently explained, Michigan courts, "have never gone so far as to make sellers insurers of their products and thus absolutely liable for any and all injuries sustained from the use of those products. . . . [W]e require the plaintiff to prove that the product itself is actionable—that something is wrong with it that makes it dangerous. This idea of 'something wrong' is usually expressed by the adjective 'defective' and the plaintiff must, *in every case, in every jurisdiction*, show that the product was defective." *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 682-83 (1984) (emphasis in original).[2]

Plaintiff argues that the defendants in this case were negligent and breached the implied warranty of merchantability by failing to warn him of the dangers of diving off the dock into shallow water, by failing to warn him

that the water was shallow and by failing to provide adequate instructions on the use of the dock. The product alleged to have been defective is the dock itself. The defect alleged is the failure to warn of the dangers associated with the use of the dock as a diving platform. Essentially, the plaintiff argues that the dock, which appears to have been properly and soundly constructed, became an unreasonably dangerous product because it was not installed with the appropriate warnings. Plaintiff asserts that, had he been warned of the shallow water, he would not have dived into the lake.

In order to establish that a failure to warn was the proximate cause of an injury, the plaintiff must demonstrate that the presence of a warning would have avoided the accident. *Spencer*, 141 Mich. App. at 361-62. The plaintiff must also establish, however, that the product itself was defective, in the sense that it was unreasonably dangerous because it lacked the appropriate warnings or instructions. *Prentis*, 421 Mich. at 682-83. A product is unreasonably dangerous if the risks associated with its use are unreasonable in light of the foreseeable injuries. *Prentis*, 421 Mich. at 688; *Owens*, 414 Mich. at 425; *Moning v. Alfono*, 400 Mich. 425, 450 (1977); *Guaranteed Construction*, 153 Mich. App. at 392-93; *Pettis*, 150 Mich. App. at 301-02. Thus, in order to establish that the defendants are responsible for his injuries, the plaintiff must demonstrate that the dock was unreasonably dangerous for its intended and foreseeable uses because it did not contain a warning that the water in Diamond Lake was too shallow to permit head-first diving from the dock.

Certainly, the danger that individuals would dive from the dock into Diamond Lake was foreseeable, as was the possibility that an individual who dove would be seriously injured. And we can take plaintiff at his word that the

presence of a warning regarding the depth of Diamond Lake would have prevented him from diving. But this does not establish that the dock itself was unreasonably dangerous, nor does it establish that the dock was the proximate cause of plaintiff's injuries.

Plaintiff was injured when he dove from the dock into the shallow waters of Diamond Lake. The dock itself did not give way, nor did plaintiff slip and fall into the water because the surface of the dock was improperly constructed. Nothing about the dock, except its presence on the shore of Diamond Lake, contributed to the plaintiff's injuries. We may accept as true plaintiff's characterization of the defendants as the manufacturers and designers of the dock.[3] The fact remains, however, that nothing the defendants did, nor any property of the dock they constructed, contributed to plaintiff's injuries. The cause of his injuries was Diamond Lake's shallow water, not the dock. Suppose that, instead of a dock, the summer home was situated on a cliff, or a dune above the lake. If plaintiff dove from such a natural structure into the shallow water of the lake, he would have been injured in exactly the same way. The same result would have occurred if plaintiff dove into the water from the deck of a boat, or from a large rock located near the shore. The presence or absence of the defendant's product would not have changed plaintiff's injuries.

In every case in which a duty to warn has been found, something about the product at issue was the proximate cause of the plaintiff's injuries. In *Pettis v. Nalco Chemical Co.*, 150 Mich. App. 294 (1986), for example, the plaintiff was injured when a mold used in the manufacture of steel ingots exploded. The mold exploded because it had been treated with a chemical manufactured by the defendant which exploded when molten steel was poured into

the mold before the chemical had evaporated. In other words, plaintiff was able to demonstrate that the presence of defendant's product in the mold caused the mold to explode, causing his injuries. Similarly, in *Thomas v. International Harvester Co.*, 57 Mich. App. 79 (1974), the plaintiff was injured when a bearing on his tractor chipped and flew into his eye after plaintiff hit the bearing with a hammer. The bearing was manufactured of brittle steel, likely to chip upon impact. Plaintiff demonstrated that the product itself—the bearing—caused his injuries because he would not have been injured had the bearing been made of stronger steel or if he had been warned not to hit the bearing with a hammer. *See also, Simonetti v. Rinshed-Mason Co.*, 41 Mich. App. 446 (1972) (paint thinner exploded, burning plaintiff).

In this case, that causal connection is lacking because there is simply no evidence that dock itself contributed to plaintiff's injuries. As demonstrated above, plaintiff's injuries would have been exactly the same if he dove from some other structure into shallow water. The plaintiff cites, and the Court has found, no case imposing liability for failure to warn under similar circumstances. The only factually similar cases found by the Court hold in favor of defendants. In *Hensely v. The Muskin Corp.*, 65 Mich. App. 662 (1973), the plaintiff was injured when he dove from a seven-foot high garage into a swimming pool only four feet deep. The court held that, "Neither the manufacturer, the seller, nor the [owner] were under any duty to warn this plaintiff of an obviously dangerous use of an otherwise undangerous product." *Id.* at 663. *See also, Myers v. Donnatacci*, 220 N.J. Super. 73, 531 A.2d 398 (1987) (swimming pool manufacturers' trade association under no duty to warn of danger of diving into pools of shallow depth). In *Gordon v. Goldman Brothers, Inc.*, 515

N.Y.S.2d 39, 130 A.D.2d 457 (1987), the plaintiff was injured when he fell while hiking on a sharply sloped and gravel-covered outcropping of rock. He sued the sellers and manufacturers of the boots he was wearing at the time of the fall, on the theory that they owed a duty to warn him of the dangers associated with hiking while wearing these particular boots. The court found in favor of the defendants under the following reasoning:

> The more serious defect in the plaintiffs' proof, however, and that which requires the dismissal of the complaint . . . pertains to the issue of causation. Assuming that the boots in question were not designed for use on rocky or mountainous terrain, the circumstances of the accident do not on their face establish that the boots were in any way responsible for the fall. Noticeably missing from the plaintiffs' papers is any expert's affidavit or other evidence attesting to the fact that different boots might have prevented the accident.

Id., 515 N.Y.S.2d at 40. The *Gordon* court's reasoning is equally applicable to this case. There is simply no evidence that the dock itself had anything to do with plaintiff's injuries. Even if we accept plaintiff's unsupported allegation that he would not have dived into the water had he been warned of its depth, there is no showing that the product itself—the dock—in any way contributed to the severity of his injuries. His injuries would have been the same had the dock been made of different material, or built by different people. Indeed the injuries would have been the same had the dock not been in existence, so long as plaintiff found some platform from which to dive into Diamond Lake. I find therefore, that defendants are entitled to judgment as a matter of law because there is no showing that their product was causally connected to the plaintiff's injuries.

Even if we assume causation, however, defendants would still be entitled to judgment as a matter of law, since I cannot find that the defendants had a duty to warn in this instance. Under Michigan law, products manufacturers have no duty to warn "in situations involving known or obvious product-connected dangers where the product itself is not defective or dangerous." *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 639 (1982). There is no argument here that the dock itself was defective, except to the extent that it did not include any warnings. Plaintiff argues that the danger here was not obvious because most individuals are unaware of the dangers of diving into shallow water.[4] That very well may be true, but it does not establish that the defendants were responsible for plaintiff's injuries. Injuries are caused when people miscalculate the depth of the water into which they dive or where, as here, they dive into water without considering how deep or shallow it might be. But the fact remains that the platform from which they dive has nothing to do with the fact or the extent of their injuries. Plaintiff argues, essentially, that the defendants had a duty to warn about something other than the product they manufactured—that they had a duty to warn about the lake on which their product was situated. But the depth of the lake did not render the dock itself an unreasonably dangerous product for its foreseeable uses, since the dock did not alter or exacerbate the shallowness of the lake.

As the Michigan Supreme Court held in *Moning v. Alfono*, 400 Mich. 425, 438-39 (1977), "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. . . . [T]he question whether there is the requisite relationship,

giving rise to a duty . . . depend[s] in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable." In order to answer the question of whether a duty to warn existed, the Court must examine whether the risk associated with the product is outweighed by the utility of the manufacturer's conduct. *Id.* at 450. *See also, Prentis*, 421 Mich. at 688. Thus, in order to find, as a matter of law, that the defendants owed a duty to warn in this case, I would have to be willing to hold that the utility of the defendants' conduct in creating a dock was outweighed by the risk that someone would use that dock as a diving platform and be injured as a result. I am simply unwilling to do that. To find liability in this case would be to say that the defendants ought never to build a dock on shallow water, because it creates an invitation for some unwitting individual to dive into the water and break his or her neck. Even though it is foreseeable that people will use docks as diving platforms and that they will be injured if they dive into shallow water, I cannot find that the dock manufacturers have a duty to warn because they have no control over, nor any responsibility for, the depth of the water on which their products are placed.[5] As the court concluded in *Antcliff*, "[T]he circumstances here (a non-defective product lacking in dangerous propensities and a known or obvious product-connected danger) do not support application of the policy which would require [the manufacturer] to provide instructions for the safe [use] of its product." *Antcliff*, 414 Mich. at 639-40. Because the dock itself was not defective, and because the dangers of diving into shallow water, while perhaps under-appreciated, are well-known, I cannot find that the defendants had a duty to warn plaintiff of the risks posed by his decision to dive into Diamond Lake.

I find, therefore, that the defendants are entitled to judgment as a matter of law. First, I find that the plaintiff has been unable to demonstrate that the defendants' product was a cause of his injuries. Even assuming that the product caused plaintiff's injuries, I find that defendants had no duty to warn in this instance because the dock was not defective and the danger of diving into shallow water is well-known. Therefore, the defendants' motions for summary judgment are granted.

This resolution of the defendants' motions for summary judgment necessarily disposes of the third-party complaint against the homeowners, Arthur and Joanne Anderson and Gerald and Catherine Connor. The third-party defendants were brought into this action on a contribution/indemnity theory by the principal defendants. Since there is no liability on the part of the principal defendants, there can be no action against the third-party defendants for contribution or indemnity. The third-party complaint is, therefore, dismissed.

DATED in Kalamazoo, MI:
June 10, 1985

/s/ RICHARD A. ENSLEN
RICHARD A. ENSLEN
U.S. District Judge

FOOTNOTES

1. Plaintiff argues that the "obvious danger" rule no longer applies under Michigan law, citing *Owens v. Allis-Chalmers Corp.*, 414 Mich. 413 (1982). In *Owens*, the Supreme Court held:

> Obvious risks may be unreasonable risks, and there is no justification for departing from general negligence and breach of implied warranty principles because the dangers are patent.
>
> This is not to say that the obviousness of the danger is irrelevant. . . . [T]he obviousness of the risks that inhere in some simple tools or products is a factor in contributing to the conclusion that such products are not unreasonably dangerous. The test, however, is not whether the risks are obvious, but whether the risks are unreasonable in light of the foreseeable injuries.

Id. at 425. The Court finds *Owens* inapposite to the case at bar for several reasons. First *Owens* was a design defect case, not a failure to warn case, and the inquiry in design defect cases differs from the inquiry in failure to warn cases. In fact, the *Owens* court specifically noted that it did not decide any issue regarding the defendant's alleged duty to warn of a product defect. *Id.* at 427. Second, failure to warn cases decided after *Owens* by the Michigan Supreme Court and Court of Appeals have incorporated the "obvious danger" rationale. *See, Prentis*, 421 Mich. at 692-93; *Antcliff*, 414 Mich. at 639; *Pettis v. Nalco Chemical Co.*, 150 Mich. App. 294, 301-02 (1986); *Trotter v. Hamill Manufacturing Co.*, 143 Mich. App. 593, 602-03 (1985); *Warner v. General Motors Corp.*, 137 Mich. App. 340, 348 (1984); *Michigan Mutual Insurance Co. v. Heatilator*, 126 Mich. App. 837, 843 (1983).

While the foreseeability analysis employed in *Owens* appears to have supplanted the "simple tool/obvious danger" test applied in *Fisher v. Johnson Milk Co., Inc.*, 383 Mich. 158 (1970), even the court in *Owens* acknowledged that

the obviousness of the risk posed by certain products is an important factor in determining whether the manufacturer breached a duty owed to purchasers or users of that product. Essentially, in order to prevail, the plaintiff must demonstrate that the product at issue was defective; that it was unfit for its intended uses or foreseeable misuses. When a defect is obvious, or known to the particular plaintiff, it is less likely to render the product unreasonably dangerous in light of the foreseeable injuries associated with its use, since those dangers can be easily avoided by reasonable uses.

2. The facts of *Prentis* are particularly instructive for the case at bar. In that case, the plaintiff was injured while operating a stand-up battery powered forklift. When the forklift experienced a power surge, plaintiff lost his footing and fell to the ground, injuring his hip. The forklift did not fall on or run over plaintiff. The Court affirmed a verdict in favor of defendant, in part, on the theory that the product's alleged defect was not the proximate cause of plaintiff's injuries.

Similarly, in *Spencer*, the court of Appeals affirmed a summary judgment granted to a tire manufacturer, where the plaintiff was unable to show that the existence of a warning would have prevented the accident. In *Spencer*, the plaintiff was injured while changing a tire in the course of his employment. He argued that the tire manufacturer had a duty to warn of the dangers associated with the particular type of tire at issue. The court found the defendant entitled to summary judgment, because the evidence showed that plaintiff continued to change tires in exactly the same manner as before even after the accident occurred. Thus, the court concluded that the presence of a warning would have had no effect on the probability that an accident would occur. Since plaintiff was unable to demonstrate a causal connection between the alleged product defect and the injury he suffered, summary judgment was appropriate. *Id.* at 361-62.

3. Defendants Park Shore, Landow and Palatinas argue that they did not manufacture or design the dock. They argue, instead, that they merely installed existing dock pieces into existing steel supports and repaired those dock pieces which required replacement. Similarly, defendant Lakeshore argues that it did not manufacture the dock itself, since it only manufactured the replacement dock pieces used by Park Shore to repair the dock.

4. The parties disagree on the degree to which this plaintiff was aware of the risks associated with diving into shallow water. Plaintiff asserts that he would not have dived into the water had he known of its depth. The defendants point to plaintiff's admission in his deposition that he had been swimming for many years and that he understood that one could be injured by diving into shallow water.

The Court agrees with plaintiff that his generalized awareness of the risks associated with diving into shallow water does not require the Court to find that he was aware of the danger present in this specific dive. *See, Graham v. Ryerson*, 96 Mich. App. 480, 489 (1980) ("Consciousness of a vague danger, without appreciation of the seriousness of the consequences, may require the manufacturer to provide warning; presentation of credible evidence results in a jury question"); *Cronlie v. Positive Safety Mfg.*, 50 Mich. App. 109, 114 (1973) ("The fact that a person had notice at one time of a danger or defect in a product does not relieve the manufacturer of his duty to warn in every case").

5. Finding a duty to warn here would be like finding that an asphalt manufacturer had a duty to warn automobile accident victims that being thrown onto asphalt paving after a car accident would cause them to injure themselves. Assuming that the paving was properly done, the fact that a street is paved has little if any connection to the injuries caused by automobile accidents.

App. 20

[Filed June 10, 1988]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. K86-452 CA8

HERBERT H. JOHNSON, JR.,

Plaintiff,

v.

PARK SHORE MARINA, a partnership;
JOHN L. LANDOW, doing business
as Park Shore Marina;
STEVEN M. PALATINAS, doing business
as Park Shore Marina, and
LAKE SHORE PRODUCTS, INC.,

Defendants and Third-Party Plaintiffs,

v.

ARTHUR D. ANDERSON; JOANNE ANDERSON;
GERALD F. CONNOR; and CATHERINE M. CONNOR,

Third-Party Defendants,

and

LAKE SHORE PRODUCTS, INC.,

Cross Plaintiff,

v.

PARK SHORE MARINA; JOHN L. LANDOW; and
STEVEN M. PALATINAS,

Cross Defendants.

JUDGMENT ORDER

In accordance with the written opinion dated June 10, 1988;

IT IS HEREBY ORDERED that Defendant Park Shore Marina, John L. Landow and Steven M. Palatinas' Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that Defendant Lake Shore Products, Inc.'s Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that the Third-Party Complaint is DISMISSED;

IT IS FURTHER ORDERED that Judgment is entered in favor of DEFENDANTS and against PLAINTIFF and that this case is closed.

DATED in Kalamazoo, MI:
June 10, 1988

/s/ RICHARD A. ENSLEN
RICHARD A. ENSLEN
U.S. District Judge